

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs

Case No: 05-80025
Honorable Victoria A. Roberts

TIMOTHY O'REILLY, ET AL,

Defendants.

_____ /

AMENDED MOTION SCHEDULING ORDER

The Court adds the following motion to the motions scheduled for oral argument on November 15, 2007, and removes it from the motion calendar set for January 28, 2008:

(Docket #178) Motion for Access to Jury Selection Records and Materials.

The Court requests that the parties brief the following issue, which will be heard on November 15, 2007 as well:

Statutory construction/meaning of 18 U.S.C. §2113(e). The Court is particularly interested in what the statutory penalty is for the offense charged in Count Two of the Second Superceding Indictment.

Finally, the Court requires briefing on this issue:

18 U.S.C. §3593(e) is silent on the burden of proof the jury is to abide by in weighing aggravating factors against mitigating factors. However, 18 U.S.C. §3593(c) makes clear that the government has to establish the existence of aggravating factors (statutory and non-statutory) beyond a reasonable doubt, and that the Defendant must

establish the existence of mitigating factors by a preponderance of the evidence.

18 U.S.C. §3591(a)(2) says that any defendant who has been found guilty of an offense for which the death penalty can be imposed shall be sentenced to death if such a sentence is justified after consideration of the factors set forth in §3592, "as determined beyond a reasonable doubt at the hearing under §3593."

Using rules of statutory construction and existing law, please brief whether the weighing process the jury is required to engage in under §3593 requires them to find beyond a reasonable doubt that the aggravating factors sufficiently outweigh the mitigating factors?

Assuming that the standard is "beyond a reasonable doubt," does this transform any non-statutory aggravating factors that the jury may consider into an element of the offense(s) charged such that the non-statutory aggravating factor should have been included in the Indictment?

The Court sets the following briefing schedule:

The Government's Brief is Due: **October 29, 2007**

Defendant's Brief is Due: **November 5, 2007**

The Government's Reply is Due: **November 9, 2007**

Oral Argument: **November 15, 2007 at 10:00 a.m.**

IT IS ORDERED.

/s/ Victoria A. Roberts
Victoria A. Roberts
United States District Judge

Dated: October 19, 2007

The undersigned certifies that a copy of this document was served on the attorneys of record by electronic means or U.S. Mail on October 19, 2007.

s/Linda Vertriest _____
Deputy Clerk